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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 725

IN THE MATTER OF
MARATHON FOUNDRY AND MACHINE COMPANY, A CORPORATION, DEBTOR,

Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Marathon Foundry and Machine Company, a corporation, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on December 22, 1955.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, as of the date hereof, has not been

officially reported. The opinion, however, is printed in full in Appendix A, pages 17 to 25, and is contained in the certified copy of the record.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 22, 1955. (Appendix B, page 26, and certified record.)

A petition for rehearing was filed by the petitioner and on January 18, 1956, the United States Court of Appeals entered an order denying said petition for rehearing. (Appendix C, page 27, and certified record.)

The jurisdiction of this court is invoked by petitioner under Title 28, U. S. C., Section 1254(1).

QUESTION PRESENTED.

Whether a court of bankruptcy in a proceeding for corporate reorganization under Chapter X of the Bankruptcy Act may order the sale or liquidation of a substantial and major asset of the debtor, where such asset is not of a perishable nature, where no plan of reorganization has been filed, and where no emergency exists requiring a sale to avoid the loss of said asset.

STATUTE INVOLVED.

Section 116(3) of the Bankruptcy Act; 11 U. S. C., Section 516(3):

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers and duties in this chapter conferred and imposed upon him and the court
>
> * * * * *
>
> "(3) Authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may pre-

scribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;"

Section 216(10) of the Bankruptcy Act; 11 U. S. C., Section 616(10):

"A plan of reorganization under this chapter

* * * * *

"(10) shall provide adequate means for the execution of the plan, which may include * * * the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; * * *".

STATEMENT OF THE CASE.

On April 30, 1953, an involuntary petition in bankruptcy was filed against the petitioner in the United States District Court, for the Northern District of Illinois, Eastern Division (hereinafter referred to as the "District Court") (R. 2). On May 20, 1953, petitioner filed its petition for reorganization under Chapter X of the Bankruptcy Act, which petition was approved as having been filed in good faith (R. 2). Thereafter, trustees were appointed in the reorganization proceeding (R. 2).

The assets of the petitioner consisted of: (a) Manufacturing plant located at Wausau, Wisconsin, which was appraised by the trustees at $294,019; (b) machinery, equipment, tools and inventory located at the Wausau, Wisconsin, plant, appraised by the trustees at $247,000 (R. 52); and (c) 32,126 shares of the capital stock of Bethlehem Foundry & Machinery Co. (hereinafter referred to as "Bethlehem") (R. 55-56). In addition, there is on deposit with the Chicago Title and Trust Company approximately $165,000 to insure the payment of certain

tax and lien claims (R. 58), a small amount of cash which at April 30, 1955 amounted to $13,000 (R. 57) and controversial claims of the petitioner (R. 58).

Of the machinery, equipment, tools and inventory aforesaid, machinery having an appraised value of approximately $114,000 was sold by the trustees upon return of bids in open court for $85,100 (R. 54); and machinery and equipment with an appraised value of $133,000 was leased to Wausau Manufacturing Co. pursuant to order of court (R. 54). The manufacturing plant of the petitioner was leased to Wausau Manufacturing Co. by the trustees for a three-year period commencing May 1, 1954. The trustees in their report to the court filed May 2, 1955 stated as follows:

> "There also exists the possibility that a lease for a longer term may be negotiated" (R. 60).

The disposition of the petitioner's property by sale and lease was not pursuant to any plan of reorganization, no plan having been suggested to the court.

On March 14, 1954, the District Judge, pursuant to the petition of the trustees for instructions (R. 4, *et seq.*), entered an order to show cause why the aforesaid shares of stock of Bethlehem should not be sold to Metals Disintegrating Company, Inc. for $25.00 per share, or to any higher bidder (R. 13-14); the order also appointed an appraiser for the shares.

On April 22, 1955, the petitioner filed objections to the proposed sale, stating as follows (R. 18):

> "1. No Plan of Reorganization has been approved by the Court in the present proceedings.
>
> "2. The shares of stock proposed to be sold by the Trustees herein represent the principal asset of the Debtor. The facts alleged in the Petition of the Trustees do not disclose the existence of any emergency to

justify the sale of said shares of stock otherwise than in pursuance of a Plan of Reorganization.

"3. The sale of these said shares of stock will make impossible the reorganization of the Debtor."

At the hearing held April 25, 1955, upon the return of the show cause order, before the Referee in Bankruptcy acting as a special Master, the appraiser testified that the shares had a fair market value of $775,521.64 (R. 26). An offer was there made by Intelectron, Inc. of approximately $910,000 for the petitioner's shares in Bethlehem (R. 35). The petitioner filed its objections to any sale, stating *inter alia* (R. 62):

> "If said stock is sold no Plan of Reorganization would be feasible because the main asset of the Debtor would be sold, and the Debtor would be left with a plant and machinery and equipment which are entirely leased out to Borg-Warner for a period of time, pursuant to orders of Court heretofore entered in these proceedings";

and in amended objections, petitioner stated (R. 66):

> "If said stock is sold no Plan of Reorganization would be feasible because the main asset of the Debtor would be sold, and the Debtor would be left with a plant and machinery and equipment which are entirely leased out to Wausau Manufacturing Company, a subsidiary of Borg-Warner, pursuant to orders of Court heretofore entered in these proceedings, for a term of three years commencing May 1, 1954, with the option on the part of the lessee to cancel same on April 30, 1956. • • •
>
> "The sale of the stock would be a step in the liquidation in installments of the property of Debtor, contrary to the purpose and intent of Chapter X of the Bankruptcy Act (*In re Solar Manufacturing Corporation,* 176 Fed. 2nd 493)."

On May 27, 1955 the District Judge entered an order *nunc pro tunc* May 9, 1955, accepting the bid of Intelectron,

Inc. and ordering the trustees to sell the Bethlehem shares to Intelectron, Inc. The order further provides that the sale shall not be consummated in any of the following events:

> (a) That if there shall have been filed with the trustees suggestions or proposals for a Plan by May 20, 1955 which, if approved, will assure a greater return than the bid of Intelectron, Inc. and a cash deposit sufficient to indemnify the estate against loss if the Intelectron bid is lost or withdrawn; or
>
> (b) If the debtor by May 20, 1955, or such other date fixed by the judge, deposits sufficient cash to pay all debts including costs of administration; or
>
> (c) The trustees, by July 20, 1955, shall have filed their Plan providing for retention or other disposition of the shares.

(R. 96, 97 and 98). The order contains no finding of emergency necessitating the sale, nor was evidence adduced in respect thereof. On appeal, the Court of Appeals affirmed the order of the District Judge.

REASONS FOR GRANTING THE WRIT.

The Decision of the Court of Appeals Is in Conflict With Applicable Decisions of This Court and of Other Courts of Appeal.

The problem presented is of major importance in the field of bankruptcy administration and particularly in corporate reorganization under Chapter X of the Bankruptcy Act, 11 U. S. C. Sec. 501 *et seq.* and is one which will inevitably continue to recur. The decision of the Court of Appeals for the Seventh Circuit is in conflict with applicable decisions of this Court and of the Courts of Appeal for the Second and Third Circuits on the same matter. Such conflicting views affecting important questions of the construction of Chapter X and of bankruptcy administration ought not to be left in doubt.

Chapter X contemplates rehabilitation and not liquidation. The purpose of a Chapter X proceeding is to maintain going concern values and to readjust a business life so that it can continue and not to dismember the debtor by a liquidation which is not pursuant to a plan. *In re Solar Mfg. Corp.* (C. A. 3, 1949), 176 F. 2d 493, 494.

This court in affirming the dismissal of a Chapter X proceedings in *Fidelity Assurance Association* v. *Sims* (1942), 318 U. S. 608, for the reason that the petition had not been filed in good faith in that there was no prospect that the debtor could be reorganized, held that Congress did not intend resort to Chapter X to be had for the mere purpose of liquidation and stated at page 621:

> "The scheme of the chapter precludes any such conclusion. The mandate of Sec. 144 is clear that unless the judge is satisfied the petition was filed in good faith he must dismiss it. Under the predecessor of Chapter X,—Sec. 77(b) of the Bankruptcy Act,—the district judge was given authority, by subsection (c) (8), under certain circumstances, to 'direct the estate to be liquidated, or direct the trustees to liquidate the estate * * *.' In Chapter X, on the other hand, Sec. 236(2) provides that if no plan is approved or accepted, or if it is not consummated, the judge may, after hearing all persons in interest, adjudge the debtor a bankrupt or dismiss the proceedings as he may decide is in the interest of creditors and stockholders. Thus the statute does not contemplate a liquidation in a Chapter X proceeding but a liquidation in ordinary bankruptcy or a dismissal outright."

and at page 622:

> "Congress did not intend a Chapter X case to be turned into a liquidation proceeding at the outset, but intended the litigation to become a straight bankruptcy only after the failure to consummate a plan, and meant to limit the parties to their remedy in ordinary bankruptcy in all other cases."

Albeit this court has held that the statute does not contemplate a liquidation in a Chapter X case, the Courts of Appeal for the Second, Third and Seventh Circuits have not permitted the decision to impede a trend toward liquidation in reorganization proceedings. The decision of this court is held to be only a precedent for the question of good faith as of the time of filing the petition for reorganization under Chapter X.

Sales Pursuant to Plan Under Chapter X.

The Courts of Appeal have held that a plan of reorganization may provide for the sale of all of the debtor's property, and the distribution of the proceeds to its creditors. Thus the Court of Appeals for the Second Circuit in *Country Life Apartments* v. *Buckley* (1944), 145 F. 2d 935, relying on Section 216(10) of the Bankruptcy Act, 11 U. S. C. Sec. 616(10), as its authority, approved a plan providing for the sale of all of the assets of the debtor. To like effect is the decision of the Court of Appeals for the Seventh Circuit in *In re Lorraine Castle Apartments Bldg. Corporation* (1945), 149 F. 2d 55. The Court of Appeals for the Second Circuit in *Patent Cereals* v. *Flynn* (1945), 149 F. 2d 711, extended the rule and held that where there has been a sale of the debtor's assets prior to the submission of a plan, Section 216(10) nevertheless permits of a plan concerned only with distribution of the proceeds. That court, in considering the question of liquidation under a plan, in *In re Pure Penn Petroleum Co.* (1951), 188 F. 2d 851, 854, stated:

> "Section 216(10), applicable to a Chapter X proceeding, provides that a plan may authorize the sale of all the assets 'at not less than a fair upset price' and the distribution of the proceeds among the creditors. Although *Fidelity Assurance Ass'n* v. *Sims*, 318 U. S. 608, 63 S. Ct. 807, 87 L. Ed. 1032, throws some

> doubt on the scope of that section, the *Sims* case has been held to authorize a sale in pursuance of a Chapter X plan, at least where the original Chapter X petition was filed in good faith."

From the foregoing, it appears that the Courts of Appeal have approved liquidations in Chapter X proceedings pursuant to a plan under Section 216(10).

Sales in Chapter X Proceedings in the Absence of a Plan.

Absent a plan of reorganization, may a liquidation be effected by order of court? Section 116(3) of the Bankruptcy Act; 11 U. S. C. Sec. 516(3), provides:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court— * * *
>
> "(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;"

When, under Section 116(3) does the court have power to authorize a trustee *upon cause shown* to sell the property of the debtor? To prove "cause" for a sale under Section 116(3) it is necessary to show that the assets are in effect perishable. The sale is confined to emergencies where there is imminent danger that the assets will be lost if prompt action is not taken.

In *In re V. Loewer's Gambrinus Brewery Co.* (1944), 141 F. 2d 747, the Court of Appeals for the Second Circuit affirmed an order of the District Court approving the sale for cash of virtually all the income-producing property of the debtor outside the plan of reorganization, but pointed out specifically that the order of sale was made upon the finding that the property sold was perishable, and would

deteriorate excessively in a short period of time when the brewery was not being operated.

In re Solar Mfg. Corp. (1949), 176 F. 2d 493, involved the sale of virtually all the assets of the debtor, not in pursuance of a reorganization plan. The Court of Appeals for the Third Circuit held that the sale of the entire assets of a debtor in reorganization is a proper part of a Chapter X proceeding when the sale is made pursuant to a plan.

The Court stated at pages 494-495:

> "We think that sales under court order not in pursuance of a reorganization plan are to be confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken. * * * But we do not think that in the ordinary case the elaborate protective provisions of Chapter X are to be short circuited by a trustee's sale on court order without going through the usual statutory procedure. The decisions under the section involved in Chapter X bear out this view." (Citing *In re Loewer's Gambrinus Brewery Co., Inc.*, 2 Cir., 1944, 141 F. 2d 747).

That the Court of Appeals for the Second Circuit is committed to the emergency doctrine of the *Solar* case, is demonstrated in *In re Pure Penn Petroleum Co.* (1951), 188 F. 2d 851. There the debtor presented an arrangement under Chapter XI to sell all its assets, and with the proceeds to make payment to its creditors. Over a creditor's objection, the District Court confirmed the arrangement and sale. The creditor appealed from the order of sale. Although *Pure Penn* involved a Chapter XI arrangement, the Court of Appeals compared Section 313(2) of Chapter XI, 11 U. S. C. Sec. 713(2), to corresponding Section 116(3) of Chapter X, and stated at page 854:

> "Under Chapter XI, a sale of all the debtor's assets may be authorized, pursuant to Sec. 313(a), 11 U. S. C. A. Sec. 713(2), only 'upon cause shown.' This

section is worded the same as Sec. 116(3), 11 U. S. C. A. Sec. 516(3), relative to such a sale in a Chapter X proceeding. It has been held that to prove 'cause' for a sale under Sec. 116(3) it is necessary to show that the assets are, in effect, 'perishable'; such a sale must 'be confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken.' *In re Solar Mfg. Corp.*, 3 Cir., 176 F. 2d 493, 494. See also *In re V. Loewer's Gambrinus Brewing Co., Inc.*, 2 Cir., 141 F. 2d 747, 748, * * *."

The *per curiam* opinion of the Court of Appeals for the Second Circuit in *Frank* v. *Drinc-O-Matic, Inc.* (1943), 136 F. 2d 906, holding that when a petition in a Chapter X proceeding has been approved, the court has power under Sec. 116(3) to sell any property of the debtor upon such terms and conditions as the judge may approve, must be restricted in the light of the later limited holding of the same court in *Loewer's Gambrinus* and *Pure Penn.*

The Decision of the Courts Below.

The Court of Appeals for the Seventh Circuit in affirming the order of sale by the District Court grounded its decision solely on the authority of the Court of Appeals for the Second Circuit in *Drinc-O-Matic.* It did not consider the decision of this court in *Fidelity Assurance Association* v. *Sims,* nor the subsequent cases of the Courts of Appeal for the Second and Third Circuits hereinbefore cited. The record in the instant case (R. 57) shows that the Bethlehem stock ordered to be sold constitutes a substantial and major asset of the debtor. The sale was not in pursuance of a reorganization plan under Section 216(10). In such circumstances, a sale pursuant to Section 116(3), under the doctrine of the above cited cases, could only be had upon a finding of an emergency in that

the asset was in effect perishable, and there was danger of its loss if prompt action was not taken. The Trustees' petition for instructions regarding the sale of the Bethlehem stock (R. 4-7) did not allege the existence of an emergency involving imminent danger of loss of the stock if it were not promptly sold. The Trustees in the hearings before the Referee did not prove the existence of any emergency. The order of the District Court (R. 96-97) did not make any findings of fact, based upon evidence, supporting the conclusion that an emergency existed and that "cause" had been shown.

The question of whether an emergency existed was before the court. The debtor in written objections to the proposed sale of the stock stated (R. 18):

> "2. The shares of stock proposed to be sold by the Trustees herein represent the principal asset of the Debtor. The facts alleged in the Petition of the Trustees do not disclose the existence of any emergency to justify the sale of said shares of stock otherwise than in pursuance of a Plan of Reorganization."

The following statement of the court in *In re Pure Penn Petroleum Co.* (C. A. 2) 188 F. 2d 851, 854, is particularly applicable:

> "The debtor here, therefore, was obliged to allege and had the burden of proving the existence of an emergency involving imminent danger of loss of the assets if they were not promptly sold. The petition for sale fell far short of alleging such facts. Nor is there a finding of fact, based upon evidence, supporting the conclusion that 'cause' had been shown. Such a finding is required."

Despite the statement contained in their report filed May 2, 1955, that:

> "Trustees are of the opinion that the best interest of this estate and the creditors thereof require the continued operation of the business of the Debtor" (R. 60),

the record in this case discloses a piecemeal liquidation under the guise of a Chapter X reorganization. The debtor brought this fact before the District Court in its amended objections to the proposed sale of the Bethlehem shares when it stated as follows:

> "d. The sale of the stock would be a step in the liquidation in installments of the property of Debtor, contrary to the purpose and intent of Chapter X of the Bankruptcy Act (*In Re Solar Manufacturing Corporation,* 176 Fed. 2nd, 493)." (R. 66.)

The debtor's machinery having an appraised value of $114,000 has already been sold, not at auction, but on a return of bids in open court (R. 54). The remainder of debtor's physical assets consisting of its plant and equipment located at Wausau, Wisconsin, are leased to Wausau Manufacturing Company pursuant to orders of the District Court for a term of three years from May 1, 1954 with the option of lessee to cancel on April 30, 1956. (R. 54, 55, 60 and 66.)

To convert a Chapter X reorganization proceeding into a piecemeal liquidation is proscribed by the act, by the decision of this court in *Fidelity Assurance Association* v. *Sims,* 318 U. S. 608, and the authorities herein cited.

The decision of the Court of Appeals for the Seventh Circuit conflicts with the decisions in similar situations of the Courts of Appeal for the Second and Third Circuits and with the decision of this court in *Fidelity Assurance Association* v. *Sims.*

To sustain the action of the courts below is to permit a liquidation under Chapter X as in cases of straight bankruptcy without the safeguards pertaining to liquidation of assets in straight bankruptcy proceedings.

Abuse of Discretion.

The Court of Appeals labored under the erroneous impression that it could not reverse unless it was found that the District Court had abused its discretion. There is not here involved the question of whether the District Court abused its discretion in authorizing the sale, or whether the Court of Appeals should substitute its discretion for that of the District Court. As the Court of Appeals for the Third Circuit stated *In re Solar Mfg. Corp.*, 176 F. 2d, 493, 495:

> "If this were all there were to the case, however, it would be a serious question whether we would be justified in saying no to a business transaction urged by the trustees and satisfactory to the court. In the view we take of the case, however, we are not substituting our discretion for theirs. We are saying that the safeguarding provisions of Chapter X are not to be ignored in the sale of the assets of a business unless an emergency exists. We do not think that the facts of the present case present such an emergency as justifies the short-cut proposed to be taken."

CONCLUSION.

The courts below in permitting a sale of the major and principal asset of the debtor in a proceeding under Chapter X of the Bankruptcy Act, in the absence of a Plan of Reorganization and in the absence of any showing or finding of emergency for such sale, have construed the provisions of the Bankruptcy Act contrary to the decisions of the Courts of Appeal of other circuits and contrary to the decision of this court in *Fidelity Assurance Association* v. *Sims*. It is imperative that this court review the decision of the Court of Appeals for the Seventh Circuit, which so vitally affects the administration of estates in reorganization.

It is submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACOB COHEN,
Counsel for Petitioner.

J. H. SCHWARTZ,
IRA S. KOLB,
Of Counsel.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11534. OCTOBER TERM, 1955—OCTOBER SESSION, 1955.

In the Matter of
MARATHON FOUNDRY AND MACHINE COMPANY, A CORPORATION, DEBTOR.
MARATHON FOUNDRY AND MACHINE COMPANY,
Debtor-Appellant,
vs.
JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, Trustees of Marathon Foundry & Machine Company, a corporation,
Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 22, 1955.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Debtor has appealed from an order of the district court entered May 27, 1955, directing appellees to sell, for $910,129.58, to Intelectron, Inc. 32,126 shares of the capital stock of Bethlehem Foundry & Machine Co., a Pennsylvania corporation, which stock is an asset of debtor, but which is subject to liens aggregating $500,000 more or less.

An involuntary petition in bankruptcy was filed against debtor on April 30, 1953. Debtor filed its voluntary peti-

tion for reorganization under chapter X of the bankruptcy act[1] on May 20, 1953. Said petition was approved as filed in good faith and thereafter appellees were appointed trustees in the reorganization proceedings. In addition to its Bethlehem stock, debtor's assets consisted of a manufacturing plant and equipment at Wausau, Wisconsin[1a], controversial claims against various individuals and indirectly against the United States aggregating about $350,000, and thereafter a fund of approximately $165,000 held by Chicago Title and Trust Company, pursuant to order of court, to insure payment of certain tax and lien claims, and a small amount of cash accumulated by the trustees as a result of the operation of the debtor. The Bethlehem holdings constitute about 70 per cent of Bethlehem's outstanding stock.

On March 14, 1955, the trustees filed a petition in the district court, requesting instructions. At that time no plan of reorganization had been filed. They advised the court that it would be to the best interests of all parties that the Bethlehem stock be sold to the best and highest bidder; that they had no funds with which to redeem the stock, which was held by secured creditors; that such sale would make it possible to pay such secured creditors in full and to realize an additional sum to assure the general creditors a substantial amount, while still leaving the other assets of the debtor to be the subject of a plan of reorganization. The trustees further represented that they had been able to obtain an offer of about $800,000 for said stock, free and clear of any lien.

On March 14, 1955, the district court entered an order that all parties in interest show cause why such sale should not be made. The court by said order also ap-

1. 11 U. S. C. A., § 501 *et seq.*

1a. Subject to a lease, expiring April 30, 1957, executed by the trustees pursuant to order of the court below.

pointed an appraiser to fix the value of the Bethlehem stock, and called for bids.

The district court on April 1, 1955 ordered, *inter alia* that the trustees should file by July 20, 1955 a plan of reorganization or report their reasons why a plan could not be effected.

On April 22, 1955, the debtor, "by Jacob Dyner," filed written objections to the proposed sale of the Bethlehem stock on the following grounds: (1) no plan of reorganization had been approved, (2) the stock was the principal asset of the debtor and there was no showing of any emergency to justify its sale otherwise than in pursuance of a plan of reorganization, and (3) said sale would make impossible the reorganization of the debtor.

On April 25, 1955 the appraiser fixed the value of the stock at $775,521.64.

Pursuant to notice a referee in bankruptcy, beginning April 25, 1955, heard evidence in support of and against the petition, and on that day bids were received, the highest and best bid being that of Intelectron, Inc., for $910,129.58.

By an amended objection debtor submitted at the adjourned referee's hearing of May 9, 1955 a letter from A. J. Armstrong Co. It was dated April 20, 1955, and addressed to Jacob Dyner who, according to the letter, had represented to Armstrong that he was the sole owner of all outstanding Marathon stock. By this letter Armstrong offered to make a loan to Marathon in a sum not to exceed $975,000, to "be evidenced by a promissory note of Marathon and other instruments and agreements containing such terms, conditions, interest rates and maturity as shall be mutually agreeable to you, Marathon, and Armstrong." It was conditioned, *inter alia,* on an undertaking by Marathon to pledge its Bethlehem stock on the loan. The letter bore the notation "the foregoing agree-

ment is hereby accepted:" followed by Dyner's signature. Debtor informed the court of a later telegram to Dyner from Armstrong, which said: "Such loan to be made by Armstrong shall be evidenced by a promissory note of Marathon, and by the usual form of loan and security agreement—."

Both the referee and the district court overruled the objections filed by the debtor. By order of May 27, 1955 (entered *nunc pro tunc* as of May 9, 1955), which is the order appealed from, it was provided, *inter alia*, that the said stock should be sold unless (a) suggestions for a plan assuring to the estate and creditors thereof a greater return than the bid of Intelectron, Inc., with security for the consummation thereof, were filed by June 24, 1955[2]; or, (b) there shall have been deposited by May 20, 1955, sufficient funds to discharge all of the debts of the debtor and costs of administration; or (c) the trustees shall have filed by July 20, 1955, their plan of reorganization providing for retention or other disposition of the Bethlehem stock.[3] None of these events has occurred.

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2. This time was extended until July 11, 1955 on motion of the debtor.

3. The order of May 27, 1955 contains findings, including the following:

> "That Metals Disintegrating Co., a corporation, has heretofore made an offer to purchase said 32,126 shares of Bethlehem Foundry & Machine Co. stock for $25.00, per share; that said offer was accompanied by an earnest money deposit of $50,000;
>
> That various other competitive bids were made at said hearing, the highest and best bid being that made by Intelectron, Inc., for $28.33, per share, which produced a total offer of $910,129.58; that said offer was made in writing, subject to certain conditions and limits in time for final consummation to September 1st, 1955; that said offer was accompanied by a certified check delivered to the trustees in the sum of $50,000;
>
> That trustees herein have stated, in their opinion, the conditions contained in the offer of Intelectron, Inc., can be fulfilled;
>
> • • • • •
>
> That it appears that the debtor has a substantial equity in

The only plan presented was that filed by the trustees on July 20, 1955. Said plan recognized the sale of the 70 per cent interest in Bethlehem to Intelectron, Inc., for the sum of $910,129.58, and provided for the use of the equity derived therefrom, and for the placing of the remainder of the assets of the debtor in a new company to be formed. No court action appears to have been taken on this plan.

On July 28, 1955, the district court entered an order finding that no plan had been filed by any one but the trustees, and again directing the trustees to consummate the sale of Bethlehem stock to Intelectron, Inc. for the sum of $910,129.58, in accordance with the order of May 27, 1955.

Intelectron, Inc. has agreed to extend the date of consummation of the sale until December 31, 1955.

In this court debtor contends: (1) in the absence of an emergency, a bankruptcy court may not order the sale of the principal asset of the debtor unless made in pursuance of a plan of reorganization; (2) to authorize such sale, the court must find as a fact based upon evidence that an emergency existed involving imminent danger of

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said Bethlehem stock which will become available upon sale for either distribution or for a plan of reorganization;

That it is in the best interests of the estate herein that said stock in Bethlehem Foundry & Machine Co. be sold upon the terms and conditions hereinafter set forth to Intelectron, Inc., for the sum of $28.33, per share;

That June 24, 1955 has been fixed as the date by which creditors or stockholders may submit to the trustees suggestions for the formulation of a plan, or proposals in the form of plans;

That it is in the best interests of this estate and the creditors thereof that the benefits attainable by the acceptance of the offer of Intelectron, Inc., be not lost because of the failure of parties herein to propose a fair and equitable plan which will insure, upon approval, acceptance and confirmation to the creditors of this estate, at least as great a return as the offer of Intelectron, Inc., will produce."

loss of the assets if the sale be not consummated; (3) the primary duty for the formation of a plan of reorganization rests with the trustees under chapter X proceedings; and (4) the primary purpose of reorganization proceedings is to effect reorganization of the debtor—not to liquidate its assets.

1. On oral argument before us, debtor's counsel emphatically asserted that the district court lacked power to authorize and approve the sale of the Bethlehem stock to Intelectron.

Included in chapter X, dealing with corporate reorganizations, are several pertinent provisions.

Section 111[4] provides:

> "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Section 126[5] provides:

> "A corporation * * * may * * * file a petition under this chapter."

Section 115[6] provides:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Section 116[7] provides:

> "Upon the approval of a petition, the judge may, in

4. 11 U. S. C. A., § 511.
5. *Ibid*, § 526.
6. *Ibid*, § 515.
7. *Ibid*, § 516.

addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—* * * authorize * * * a trustee * * *, upon such notice as the judge may prescribe and upon cause shown, to * * * sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve".

The question of the power of the district court to order the sale must be resolved in the light of the circumstances existing in this case on May 9, 1955. At that time no plan of reorganization of debtor had been submitted to the court by anyone. The Bethlehem stock was owned by debtor but was not used in the conduct of its business, the revenue of which was derived from a factory under lease expiring April 30, 1957. The stock was severally held as collateral security by Louis Dreyfuss, Morris Wolf and Albert J. Grosser Co. We were told upon oral argument by Dreyfuss' counsel that Dreyfuss is entitled to accruing interest at a rate which, his counsel says, is a matter of dispute, either 8 per cent per annum as Dreyfuss contends, or 6 per cent per annum as the trustees contend. On May 9, 1955 the amount due to Dreyfuss was about $226,000, the amount then due Grosser was about $240,000 and the amount due Wolf was about $58,000. The trustees had not sufficient funds with which to redeem the pledged stock.

Under these circumstances, we hold that the district court had power, under the statutory provisions above quoted, to enter the order from which an appeal has been taken. *Frank* v. *Drinc-O-Matic,* 136 F. 2d 906.

2. The district court, having power to order the sale of the Bethlehem stock belonging to the debtor, was required to consider the existing circumstances and exercise its discretion as to whether a sale should be ordered and, if so, upon what terms and conditions. In addition to the circumstances hereinbefore set forth, upon which the power of the court to act was based, the following addi-

tional facts appear from the record. Debtor had by its petition invoked the jurisdiction of the court in a reorganization proceeding; about two years had elapsed since the filing of that petition, during which time no plan of reorganization had been submitted to the court but during which time heavy interest charges had accrued upon the debtor's loan for which the stock had been pledged; the secured creditors possessed a power of sale of the stock pledged which they were prevented from exercising by the pendency of the reorganization proceeding; proper notice of the proposed sale was given to all persons concerned; no creditor objected; an appraiser appointed by the court fixed the value of the stock at $775,521.64; Metals Disintegrating Co. had made an offer amounting to $803,150; Intelectron, Inc. had made a bid for the stock in the sum of $910,129.58 in cash; neither debtor nor Dyner, its sole stockholder, had made any bid; and the sale, if consummated at the price bid by Intelectron, would pay the secured creditors in full and leave a substantial balance for expenses of administration and general creditors.

In view of these circumstances the district court, in the exercise of its discretion, authorized the sale. We are not at liberty to substitute our discretion for that of the district court. *Frank* v. *Drinc-O-Matic, supra.* We should reverse the order appealed from only if we are satisfied that the court in entering it was guilty of an abuse of discretion.

The burden is on the debtor to establish an abuse of discretion. *Kimmel* v. *Crocker,* 72 F. 2d 599, at 601. It relies heavily upon the so-called Armstrong offer, contained in a letter to Dyner submitted at the referee's hearing of May 9, 1955. This letter suggested a loan by Armstrong to Marathon but required that it be evidenced by the debtor's note "and other instruments and agreements

containing such terms, conditions, interest rates and maturity as shall be mutually agreeable to you, Marathon, and Armstrong." It will be noted that not only is the nature of the "other instruments and agreements" left undefined, but also that the letter leaves unsettled such vital essentials as the terms, conditions, interest rates and maturity, postponing such matters to subsequent agreements, if any, among Dyner, debtor and Armstrong. Whether or not there would ever be a meeting of the minds on these important matters was on May 9, 1955 uncertain. Moreover, in a period of over two years in which the debtor's property and business had been in the bankruptcy court, this was the only suggestion which either it or Dyner had submitted to the court for ending the proceedings there. Debtor's counsel, although apparently imbued with a belief in the efficacy of the Armstrong offer, in this court characterized it rather weakly as "an offer of a loan which might have had the effect of allowing the debtor to continue as a going concern."

In view of these facts, we cannot find that the district court was guilty of an abuse of discretion in ordering that the sale to Intelectron be consummated.

For the reasons hereinbefore set forth, the order from which an appeal has been taken is

AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Thursday, December 22, 1955.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

In the Matter of
MARATHON FOUNDRY AND MACHINE CO.,
Debtor.

MARATHON FOUNDRY AND MACHINE CO.,
Appellant,
No. 11534 *vs.*
JOSEPH SCHWARTZ, ET AL., TRUSTEES, ETC.,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the Order or Decree of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Wednesday January 18, 1956.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

In the Matter of
MARATHON FOUNDRY AND MACHINE CO.,
Debtor.

MARATHON FOUNDRY AND MACHINE CO.,
Appellant,
No. 11534 *vs.*
JOSEPH SCHWARTZ, ET AL., TRUSTEES, ETC.,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause, be, and the same is hereby, DENIED.

FILE
MAR 21
HAROLD B. WIL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 725

IN THE MATTER OF
MARATHON FOUNDRY AND MACHINE COMPANY,
A CORPORATION, DEBTOR,
Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS, JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES, IN OPPOSITION.

FRANCIS S. CLAMITZ,
Attorney for Joseph Schwartz, and Francis J. Curtis, Trustees, Respondents.

MANUEL E. COWEN,
MARTIN S. GERBER,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS, JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES, IN OPPOSITION.

OPINION BELOW.

The opinion below is printed in full and in Appendix A, pages 17 to 25 of petition for certiorari.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Did the District Court, in a proceeding under Chapter X of the Bankruptcy Act, have power to order a sale of certain securities owned by the Debtor, but not used in its manufacturing operations, which were in the possession of the pledgees thereof and who had been restrained from selling, for over two years, where the trustees had no funds to discharge the pledge, and where heavy interest charges were accruing, and there remained, after said sale, the real estate, manufacturing facilities and other assets of the debtor, for reorganization.

STATUTE INVOLVED.

Section 115 of the National Bankruptcy Act; 11 U. S. C. A. 515:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Section 116 (3) of the National Bankruptcy Act; 11 U. S. C. A. 516 (3):

> "Upon the approval of a petition the judge may in addition to the jurisdiction, powers and duties in this chapter conferred * * * (3) authorize a receiver or trustee upon such notice as a judge may prescribe and upon cause shown * * * to sell any property of the debtor real or personal upon such terms and conditions as the judge may approve."

I.

STATEMENT OF FACTS.

The facts of the case have been incompletely stated by the petitioner. The respondents, trustees of the Estate of Marathon Foundry and Machine Company, a corporation, debtor, will therefore present their additional statement of pertinent facts.

The stock of Bethlehem Foundry and Machine Company ordered sold below was acquired as an investment by the debtor and not used in the operation of the debtor's business (R. p. 6). Said Bethlehem stock was pledged for approximately $523,000 (R. p. 95), and the United States claimed a lien for taxes in the sum of $150,000 (R. p. 95, pp. 115-121), to attach to the debtor's interest. The pledgees have been restrained for over two years from selling the Bethlehem stock (R. p. 94); the trustees have insufficient funds with which to redeem the stock. As of April 30th, 1955, they had only $13,000 (R. p. 57). Heavy interest charges have accrued on the loan for which the stock had been pledged, and the holders of the stock possess a power of sale of the stock pledged (Petitioner's Appendix A, p. 24).

A sale of the pledged Bethlehem stock would produce funds in excess of $250,000, for effectuating a possible plan of reorganization, or for distribution to creditors after the payment of the secured claims thereon (R. p. 5).

For many months efforts were made by the trustees to formulate a plan of reorganization in conjunction with the debtor (R. p. 5). Upon failure to consummate such negotiations, a plan has been filed by trustees. At no time did the debtor ever propose or suggest any plan of reorganization.

As a step in the administration of the estate which would form the basis for a trustees' Plan of Reorganization, the trustees, Joseph Schwartz and Francis J. Curtis, requested instructions of the United States District Court, by a petition filed on March 14th, 1955 (R. p. 4), advising the court that it would be to the best interests of all parties to sell the pledged stock in the Bethlehem Foundry and Machine Company owned by the debtor as an investment (R. p. 6), trustees having no funds with which to redeem the same (R. p. 57), that such sale would make possible the payment in full to secured creditors and effectuate a plan of reorganization using the cash derived from the sale and the other substantial assets of the debtor in such plan; that trustees had obtained an offer of $800,000 for the pledged Bethlehem stock (R. p. 8), free and clear of any lien.

On the hearing of trustees' petition for instructions an order was entered on March 14th, 1955 (R. p. 13); that all parties in interest, the Securities and Exchange Commission, Director of Internal Revenue, Secretary of the Treasury show cause why 32,126 shares of Bethlehem Foundry and Machine Co. stock should not be sold free and clear of all liens and encumbrances to Metals Disintegrating Co., for $25 per share, or to such bidder who makes a higher and better bid; a competent, disinterested, appraiser was appointed to appraise the shares of stock sought to be sold. It was further ordered that service of the order of March 14, 1955, together with the petition upon which it was based, be made upon all known creditors of the debtor, stockholders of the debtor, the Securities and Exchange Commission, the Secretary of the Treasury, the secured creditors of the debtor by mail, and that notice by publication be given. It was further ordered that other and higher bids might be made at the hearing set by

the order. Accordingly, a qualified appraiser was appointed by the court and an appraisal made, which was filed of record. Notice by mail and publication was given to all parties; the hearing was held pursuant to said order on April 4th, 1955 on the continued hearing held April 27th, 1955 before Referee Martin Ward, acting as Special Master (R. p. 19), testimony in support of the petition was taken, expert testimony as to the valuation of the Bethlehem stock was presented by the trustee, the appraiser appointed by the court testified as to the valuation of the Bethlehem stock, and fixed the valuation thereof at $775,000, free and clear of liens (R. p. 26 and p. 106). The debtor did not, nor did any other party in interest, offer any evidence or seriously contest the valuation fixed by the appraiser, nor did any party introduce any evidence to controvert the allegations of the petition for instructions regarding said sale of stock. There was competitive bidding (R. pp. 32-36), and the sum of $910,000 was bid for the Bethlehem stock, free and clear of all liens; this was the highest and best bid made by the Intelectron, Inc., a corporation (R. p. 35); the sale was urged by the unsecured creditors' committee (R. p. 81).

The order of sale of the pledged Bethlehem Foundry and machine Company stock, entered by Judge Campbell on May 27th, 1955, provided, among other things, that the said stock should be sold unless (a) suggestions for a plan assuring to the estate and creditors thereof a greater return than the bid of Intelectron, Inc., with security for the consummation thereof, were filed by June 24th, 1955, (This time was extended until July 11th, 1955, on motion of the debtor.) (R. p. 98), or, (b) there shall have been deposited by May 20th, 1955, sufficient funds to discharge all of the debts of the debtor and costs of administration; or (c) the trustees shall have filed by

July 20th, 1955, their plan of reorganization providing for retention or other disposition of the Bethlehem Foundry and Machine Company stock. None of these events has occurred.

The only plan presented was that filed by the trustees on July 20th, 1955. Said plan recognizes and adopts the sale of the pledged stock in Bethlehem Foundry and Machine Company to Intelectron, Inc., and provides for the use of the equity derived therefrom, and for the placing of the remainder of the assets of the debtor in a new company to be formed, pursuant to the plan of reorganization filed.

The debtor's assets, in addition to the pledged Bethlehem Foundry and Machine Company stock, consist of a manufacturing plant appraised at $294,019 (R. p. 52), and equipment appraised at $133,000 (R. p. 54), located at Wausau, Wisconsin (Tr. pp. 40-50), under lease to Wausau Manufacturing Company, a subsidiary of Borg-Warner Corporation, together with certain manufacturing equipment located in said plant (Tr. p. 52); controversial claims against various individuals and indirectly against the United States Government, aggregating approximately $350,000 (Tr. p. 58); approximately $165,000 is held by the Chicago Title & Trust Company, pursuant to order of court, to insure payment of certain tax and lien claims.

On July 28th, 1955, the United States District Court entered an order finding that no plan had been filed by any one but the trustees, and again directing the trustees to consummate the sale of the shares of stock in the Bethlehem Foundry and Machine Company to Intelectron, Inc., in accordance with the order entered on May 27th, 1955, which is the order appealed from below.

REASONS FOR DENYING THE WRIT.

I.

There Is No Conflict Between the Decisions of the Court of Appeals and the Decisions of This Court or Between the Decisions of Other Courts of Appeal.

The decision of the Circuit Court of Appeals for the Seventh Circuit is not in conflict with the decisions of any Circuit Court of Appeals and is eminently correct in regard to the application of the law to the facts in the instant case.

The facts in the instant case where a pledged investment is ordered sold, upon due notice to all parties, after appraisal and on competitive bidding, and at a price in excess of the appraisal, cannot be compared with the facts in *In re Solar Mfg. Corp.*, 176 Fed. (2d) 493, decided by the Court of Appeals, for the Third Circuit, cited by petitioner, where there was a proposed sale of all the principal assets of a manufacturing company, and where there was no adequate notice, no appraisal, no competitive bidding, and where creditors, the Securities and Exchange Commission, and a labor union objected, and where the court held that under those facts, a sale would not be ordered *except* upon the showing of "an emergency."

The *Solar* case is not in point with the instant case on the facts, but both the *Solar* case and the instant case, however, cite and base their holding on the rule set forth in *Frank* v. *Drinc-O-Matic*, 135 Fed. (2d) 906, decided by the Court of Appeals, Second Circuit, which holds that: "The petition having been approved, the court had power to sell 'any' property of the debtor, 'upon such terms and

conditions as the judge may approve.' Sec. 116 (3) of the Bankruptcy Act."

In the case of *V. Loewer's Gambrinus Brewing Co., Inc.*, Second Circuit, 141 Fed. (2d) 747, the court considered, in a Chapter X proceeding, the sale of all of the income producing property of a brewery.

In that case, the Court of Appeals said:

> "The appellant lays great stress upon the fact that here the sale was of all income-producing property of the debtor and hence was likely to prevent the adoption of any plan of reorganization and to defeat the very purpose of the reorganization proceeding. But the disposition of the property could not be longer delayed without peril to all interests. The properties were wasting assets and Section 116 (3) of the Chandler Act authorizes the sale of 'any' of them. * * * There is no requirement in the Chandler Act that the sale be in aid of a reorganization or that it await a liquidation in straight bankruptcy. Our decision in *Frank* v. *Drinc-O-Matic,* 136 F. (2d) 906, is authority for the order of sale appealed from unless the opinion of Justice Roberts in *Fidelity Assurance Assn.* v. *Sims,* 318 U. S. 608, stands in the way. But that opinion would not seem to have any bearing on the situation here. It merely states that a petition for reorganization where liquidation, and not a readjustment of the rights of creditors, was at the very outset, the only possibility, should be dismissed, as not filed in good faith. * * *"

In *Loewer's Gambrinus,* the court thus reaffirmed its holding in *Frank* v. *Drinc-O-Matic,* and disposed of the case of *Fidelity Assurance Assn.* v. *Sims,* 318 U. S. 608, cited by petitioner.

There is no conflict between the holding in the *Loewer's Gambrinus* case and in the instant case. The comment of the court in the *Loewer's Gambrinus* case, discussing the

Fidelity Assurance Assn. v. *Sims* case, applies with equal force to the case at bar.

The instant case, having been found to have been filed in good faith, is not in conflict with the case of *Fidelity Assurance Assn.* v. *Sims, supra,* cited by petitioner, particularly in view of the fact that trustees have filed their plan of reorganization, as stated by the Circuit Court of Appeals for the Seventh Circuit, in their opinion. Petitioner concedes that *Fidelity Assurance Assn.* v. *Sims* is controlling only on the issue of good faith (Pet. p. 8).

The case of *In re: Pure Penn Petroleum Co.* (C. C. A. 2), 188 Fed. (2d) 851, cited as a controlling authority by petitioner, is perfectly reconcilable with the *V. Loewers Gambrinus* case, and the *Frank* v. *Drinc-O-Matic* case, decided by the Second Circuit, and the *Solar Mfg. Corp.* case, decided by the Third Circuit. It clearly follows the reasoning of the same Court of Appeals in the earlier case of *V. Loewers Gambrinus Brewing Co., Inc.,* case, 141 Fed. (2d) 747, in which it was held that sales of perishables in a Chapter X proceeding were authorized under Sec. 115 of the Bankruptcy Act, and that sales of other assets, for cause shown, could be sold under Sec. 116 (3). The quotation from *Pure Penn Petroleum Co.,* set forth on page 12 of debtor's petition for a Writ of Certiorari, when read in the light of the *V. Loewers Gambrinus* case, shows that the Circuit Court for the Second Circuit, has consistently held that a sale will be authorized where an emergency exists *or* where the court finds "cause".

Because the *Pure Penn Petroleum Co.* case involved a Chapter XI proceeding, it is in no event a controlling authority as contended by petitioner.

The case of *Frank* v. *Drinc-O-Matic, supra,* is based upon facts nearly parallel to the instant case. There was no fund available to redeem vending machines in the hands

of a lien holder. In the instant case, there are no funds available to redeem the Bethlehem stock (approximately $525,000 required). In the *Frank* v. *Drinc-O-Matic* case, as in the instant case, due notice was given to all known creditors. There, too, the petition had been approved as having been filed in good faith, as in the case at bar.

In its opinion, quoted in full herein, the court said:

> "This is an appeal from an order in bankruptcy directing the sale for $9500 of nineteen automatic vending machines belonging to the debtor, which were in the possession of their manufacturer, who claimed a lien upon them in the sum of $4,754.79. It is not necessary to state in detail the evidence which justified the sale in the minds of the special master and the district judge who confirmed his report. Notice of the application was given to all known creditors, and the situation of the debtor was such as might well make it desirable to release the machines from the vendor's claim even if its validity was questionable, which there is no reason to suspect. The trustee had no funds with which to redeem the machines, and after six months no plan of reorganization had been proposed. Possibly, though not certainly, the sale will force on a liquidation; in any event that is not a controlling consideration. The petition having been approved, the court had power to sell any property of the debtor, 'upon such terms and conditions as the judge may approve.' Sec. 116 (3) of the Bankruptcy Act, 11 U. S. C. A., Sec. 516 (3). To succeed the appellants must persuade us to substitute our discretion for that of the district court, and that under familiar principles we should not, and will not do.
>
> "Order affirmed."

The Court of Appeals for the Third Circuit, in the case of *In re: Solar Manufacturing Co.*, 176 Fed. (2d) 493, cites the *Frank* v. *Drinc-O-Matic* case with approval.

The Court of Appeals for the Second Circuit has simi-

larly approved and cited the *Frank* v. *Drinc-O-Matic* case, in the case of *V. Loewers Gambrinus Brewing Co., Inc., supra,* and the Court of Appeals for the Seventh Circuit, in the instant case, has followed the reasoning of and cited the *Frank* v. *Drinc-O-Matic* case in its opinion below.

SUMMARY.

There is no conflict between the decisions of the Seventh Circuit and the Second or Third Circuits, as contended by petitioner, for the following reasons:

(a) The decision of each of the cases is based upon the principle that a court may order the sale of a perishable asset under the equitable powers granted by Sec. 115 of the Bankruptcy Act and of "any" asset for cause shown under Sec. 116(3) of the Bankruptcy Act.

(b) The instant case involves the specific question of the sale of a pledged asset, not used in the business of the debtor, and where the pledgees have, for over two years, been restrained from sale of their security and the trustees have been unable to redeem the property for want of funds.

There is no conflict with the decision of this Court in *Fidelity Assurance Assn.* v. *Sims, supra;* that case having been decided on the finding that the petition therein had not been filed in good faith, whereas, in the instant case, the petition has been approved as having been filed in good faith.

The Decision of the Court of Appeals Is Clearly Correct.

The opinion of Judges Major, Finnegan and Schnackenberg carefully considers the factual background of the case at bar, analyses the contentions of the appellant, petitioner here, comments on abortive efforts of the debtor, by its sole stockholder to press upon the court a nebulous

proposal for a loan, states that no plan, more advantageous to creditors than the sale of the Bethlehem, has been suggested by anyone, and, that the trustees have filed a plan of reorganization. The court then states sections 111, 126, 115 and 116 of Chapter X of the Bankruptcy Act and concludes that power exists to make a sale of the pledged Bethlehem stock under the particular circumstances of the instant case, citing *Frank* v. *Drinc-O-Matic,* 136 Fed. (2d) 906, which is hereinbefore commented upon. The question of discretion of the Trial Court is discussed and the factors involved in the exercise of that discretion are reviewed. The court considered the fact that Debtor had invoked the jurisdiction of the Court, that two years had elapsed since the filing of the petition, that at the time the trustees petitioned for instructions, no plan had been filed, that the Bethlehem stock ordered sold was not used in the conduct of its business, that the Bethlehem stock was pledged, and that heavy interest charges had accrued; that the trustees had insufficient funds with which to redeem said stock, and that the pledgees were holding a power of sale of the Bethlehem stock which they were prevented from exercising by the pendency of the reorganization proceedings. These circumstances, together with the fact that proper notice to all parties had been given, no creditor had objected, an appraiser appointed by the court had valued the stock at $775,521.64, and that a bid of $910,129.58, had been made, that neither the debtor nor the sole stockholder had made a bid at the sale, and the sale, if consummated, would pay the secured creditors in full, and leave a substantial balance for expenses of administration and general creditors. These circumstances formed the factual basis for the order of the trial court, and on these facts, the Court of Appeals found that the trial court had not abused its discretion.

III.

There Is No Important Question of Federal Law.

There is involved no new or important question of Federal Law. The decision below rests upon a sound, accepted application of the law to particular facts in this case. Any other interpretation would disregard the legislative intention to allow a District Court a wide discretion in the handling of proceeding under Chapter X of the Bankruptcy Act. Sections 115 and 116 (3) of the Bankruptcy Act spell this out so plainly that argument should be unnecessary.

CONCLUSION.

The decision of the Court of Appeals being in confirmity with the decisions of this court, and the decisions of other courts of appeals, and no important question of federal law having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS S. CLAMITZ,
Attorney for Joseph Schwartz and Francis J. Curtis, Trustees, Respondents.

MANUEL E. COWEN,
MARTIN S. GERBER,
Of Counsel.

FILED
MAR 22
HAROLD B. WILEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 725

IN THE MATTER OF
MARATHON FOUNDRY AND MACHINE COMPANY,
A CORPORATION, DEBTOR,
Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF RESPONDENT LOUIS DREYFUSS.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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AUTHORITIES CITED.

Cases.

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Text.

Collier on Bankruptcy, Vol. 6 (14th Ed.), P. 754 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 725.

IN THE MATTER OF
MARATHON FOUNDRY AND MACHINE COMPANY,
A CORPORATION, DEBTOR,

Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY, AND LOUIS DREYFUSS,

Respondents.

OPPOSING BRIEF OF LOUIS DREYFUSS, RESPONDENT, TO PETITION FOR WRIT OF CERTIORARI OF MARATHON FOUNDRY AND MACHINE COMPANY, A CORPORATION, PETITIONER.

STATUTE INVOLVED.

Section 115 of the Bankruptcy Act; 11 U. S. C. A., Section 526:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it

had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Section 116(3) of the Bankruptcy Act; 11 U. S. C., Section 516 (3):

"Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers and duties in this chapter conferred and imposed upon him and the court

* * * * *

"(3) Authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;"

QUESTIONS PRESENTED.

1. In a Chapter X proceedings where a pledgee of corporate stock (acquired by the debtor as an investment) has been under restraining order for more than two years and no suggestion appears of a method to satisfy the debt of the pledgee except by the sale of the stock does the District Court have power to order a sale of the pledged stock for the satisfaction of the debt of the pledgee and the salvaging of the equity for the estate?

2. Is there any conflict on the above facts between decisions of Courts of Appeals in different circuits or between decisions of the Supreme Court and that of the Court of Appeals in the instant case?

STATEMENT OF THE CASE.

We supplement the statement of the case of petitioner by the following matters:

The Appellee, Louis Dreyfuss, is a pledgee of the 32,126 shares of stock of the Bethlehem Foundry and Machine Company, the sale of which was authorized by the order of the District Court, affirmed by the Court of Appeals. The Court of Appeals, in its opinion, found the amount due Respondent (we shall refer to Louis Dreyfuss, appellee below in this opposing brief as Respondent) as pledgee to be about Two Hundred Twenty-Six Thousand Dollars. All of the stock in question was held as collateral security by Respondent, Louis Dreyfuss, together with Maurice Wolf and Albert J. Grosser Co. for obligations aggregating Five Hundred Twenty-five Thousand Dollars, more or less. The Court of Appeals found that the trustees, appellees below, had not sufficient funds to redeem the stock. (Petition, p. 23.) Actually, the trustees had on April 30, 1955 on hand the sum of $13,000 (Tr. 31) in free funds.

The secured creditors, the Court of Appeals found, possessed a power of sale of the stock pledged, which they were prevented from exercising by the pendency of the reorganization proceedings. These proceedings have been pending since May 20, 1953. (Petition, p. 17.) No suggestion for a plan of reorganization was ever submitted by the debtor, and the only suggestion of any sort which either it or Dyner, its sole stockholder, had submitted to the Court for ending the proceedings was the so-called Armstrong offer, which the District Court and the Court of Appeals held to be too vague and inadequate for con-

sideration. (Petition, pp. 24-25.) No creditor objected to the sale. (Petition, p. 24.) The stock was appraised for $775,521.64, and the sale was made for $910,129.58 in cash. The order appealed from provides for the satisfaction of the pledgees' claims out of the purchase price.

SUMMARY OF THE ARGUMENT.

1.

The order of sale appealed from was a means of satisfying the overdue claims of this respondent and other pledgees, who had legal title to the stock sold; these pledgees have been held captive in the proceedings in the District Court since May 20, 1953.

2.

There is no conflict between the decision of the Court of Appeals in this cause and applicable decisions of this and of other Courts.

ARGUMENT.

1.

The Order of Sale Appealed From Was a Means of Satisfying the Overdue Secured Claims of This Respondent and Other Pledgees, Who Had Legal Title to the Stock Sold: These Pledgees Have Been Held Captive in the Proceedings in the District Court Since May 20, 1953.

We have here a case in which the debtor of its own volition applied to the Court for relief under the provisions of Chapter X of the Bankruptcy Act. This voluntary act of the debtor bears date May 20, 1953; in a relatively short time this seemingly interminable voluntary Chapter X will celebrate the third anniversary of its filing.

During this entire time, a period of duration never contemplated by the proponents of the act or by Congress —not a single workable suggestion for the termination of the proceedings has come from the petitioner in this cause or from Dyner, its sole stockholder.

The power of a Court of Bankruptcy in a Chapter X proceedings to fasten upon a pledgee such as this respondent, an injunctional order preventing him from exercising his rights must be conceded. The Court, however, can determine with no more than momentary consultation with its own conscience, that this is a harsh step, which may be justified only by the thought that the life of a going business might be saved thereby. It is not consistent with equity and good conscience that a proceedings in Chapter X be kept pending not to effect a reorganization as that term is understood in the act but to obtain a moratorium on secured debts. Nor is it lawful that a pledgee's

rights be enjoined interminably without prompt and effective action to achieve the professed objective of the Chapter X, namely, the effecting of a plan of reorganization. It is to be seen from the reading of the opinion of the Court of Appeals and the examination of the record that not merely no suggestion to terminate these proceedings has been made by either the debtor or its sole stockholder, but as far as this record indicates, if the Court of Appeals had reversed this order, the only effect of such reversal would have been to extend the moratorium on these secured debts for a further indefinite period.

This appellee has been and is now demanding payment of his debt months and years after its maturity. The trustees have no money to pay any substantial part of the debt. (Petition, p. 18.) It follows, therefore, that on this record there are at present these alternatives:

(a) The dissolution of the injunction restraining the sale of the stock by the pledgees and the sale of the stock by the pledgees under their power of sale,

(b) The sale by the trustees of the stock pursuant to the order under consideration and the payment of the pledgees' debts, or

(c) The continuing of the restraining order against this respondent and the other pledgees with no time indicated as to its termination.

The last alternative is, on its face, a legal impossibility.

We have noted that the filing of this petition, a voluntary act of the debtor, bears date of May 20, 1953. Implicit in this submission to the Court of its financial problems was a representation that the pattern of its affairs was such as to give the debtor cause to believe that it could suggest to the trustees with reasonable dispatch a plan of reorganization within the purview of Chapter X.

There is a further element that enters into the consid-

eration of the present Petition for Certiorari. The Court of Appeals found that the stock in question was not used by the debtor in its business. Even so, no suggestion appears in this record as to how this stock would be made a part of a pattern of reorganization as defined *In re Solar Manufacturing Company,* the case cited by the Petitioner. The Court of Appeals in its opinion considers the so-called Armstrong offer. It is not difficult to gather from the language of the Court of Appeals in this connection that the Armstrong offer was not much more than a hoax. If that is too strong a statement, quite manifestly the Referee, the District Judge and the Court of Appeals were all agreed that the Armstrong offer did not contain the elements of a proposal for reorganization which the trustees or the Court could consider.

If there is nothing in this record after a lapse of two years and many months, that could be called a suggestion by the debtor either to reorganize the affairs of the debtor or to find a method of paying these pledgees, does not the conclusion follow that this Chapter X insofar as it relates to the stock in question was nothing more than a device to hinder and delay these pledgees in the payment of their debts?

The moral factors involved are in danger of becoming lost in semantics. There was a promise to pay at a fixed time and security was given to these pledgees without which they would not have made the loans. The injunction of this Court against the pledgees was a deprivation of right which becomes narrowly defensible as a contribution exacted from an innocent bystander at his cost to the estate of the debtor and in that way to the common good. It never was the congressional intent to deprive, in effect, a pledgee who is without guilt, of the actual value of his pledge or curtail his rights without compensation by giving to a designing debtor the power to im-

pose a moratorium of indefinite duration on the debt. The moral considerations here involved are so manifest that the citing of authorities appears superfluous. We shall cite some authorities notwithstanding our view that authorities on the foregoing concept are as unnecessary as they would be on the proposition that the law does not approve of larceny.

Not merely does this record show no recognition by this debtor of the moral quality of a debt and of the duty of a debtor to see that a pledgee is paid but its conduct from the beginning has been one of obstruction, persistent and continuous. In the District Court, in the Court of Appeals and on this application for certiorari, this debtor's scheme is transparent. It is to delay the payment of this debt in the hope that the processes of inflation will enrich the debtor to the detriment of the pledgee.

This pledgee we say again is demanding payment of its debt and asserting that it would be a wrong to continue this injunction two years and many months after the entry of it, with no hint as to when or how, if ever, the debt of this pledgee would be paid.

The finding by the Court of Appeals that the stock in question was not used by the debtor in the conduct of its business (Petition, p. 23) is another way of saying that there is nothing in this record and the court below found nothing to indicate any relation between this stock and any plan of reorganization that might possibly have been suggested. The sale of the stock would not have taken anything away from the continued operations of the Petitioner's business or from a plan of reorganization conforming to the pattern of a plan found in *Re Solar Manufacturing Co.* case cited by petitioner.

We quote an excerpt from Collier on Bankruptcy, Vol. 6, 14th Ed., p. 745, as follows:

> "A staying order under section 116(4) should not be merely an automatic response to a plea therefor or to the sole fact that reorganization proceedings are in progress (citing cases) • • • The order, if made, must not only be related to the purpose of the proceeding—reorganization—but it must contribute to the furtherance of achieving a plan (citing cases) • • • Without such reasonable possibility of achievement, a secured creditor may not be indefinitely restrained from realizing on his security (citing cases)."

See also *Lincoln-Alliance Bank & Trust Co.* v. *Dye,* 115 Fed. (2nd) 234.

From the foregoing it would appear that neither the arguments nor the authorities found in the Petitioner's Brief have any application to this case. This is not a sale of assets of a debtor, which in their aggregate were required to "maintain going concern values and to readjust a business life so that it can continue" as found in *Re Solar Manufacturing Corporation,* 176 (Fed.) 2nd 493. It is a sale to satisfy pledgees of stock in whose name this stock now appears. The trustees have an equity in the stock acquired by debtor as a speculation which they are seeking to salvage by means of this order.

The moral and legal right of these pledgees to be paid was recognized by the District Court and the order of sale to carry this purpose into effect was affirmed by the Court of Appeals. No argument appears on behalf of the petitioner or can be advanced to bring into question the correctness of this conclusion.

II.

There Is No Conflict Between the Decision of the Court of Appeals in this Case and the Applicable Decisions of This Court and Other Courts.

The voluntary Petition in this cause was approved as having been filed in good faith. No appeal from this order was presented and the correctness of that determination is not now open to question on this petition. The case of the *Fidelity Assurance Association* v. *Sims*, 318 U. S. 608 (Petition, p. 7), being the dismissal of a petition as not filed in good faith cannot therefore have any bearing here and is not inconsistent with the decision of the Court of Appeals.

The Court of Appeals in the instant case cites (Section 115 of Chapter X) 11 U. S. C. A., Section 115, as follows:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Also Section 116 (11 U. S. C. A., 516):

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court * * * authorize * * * a trustee * * *, upon such notice as the judge may prescribe and upon cause shown, to * * * sell any property of the debtor, whether real or personal upon such terms and conditions as the judge may approve."

It will be observed that both of these sections are grants of power to the Court and the judge upon the approval of

petition in Chapter X. Under this record, the sole question that arises here is whether the District Court after an order of approval had under the provisions of sections 115 and 116 of Chapter X power to deal with the problems confronting the Court upon this attempt by the trustees to satisfy the overdue claims of these pledgees and salvage something for the estate out of the equity in the pledge stock.

The language of these sections is too clear for construction. The argument of the Petitioner is an attempt to emasculate clear language. If adopted, it would leave the District Court without power to relieve this respondent from an injunctional order of too long duration while at the same time enabling the trustees to salvage for the estate the equity in the stock. The cases in *Re Solar Manufacturing Co.*, 176 Fed. (2d) 493 and in *Re Pure Penn Petroleum Co., Inc.*, 188 Fed. (2d) 851 are not as claimed in this Petition inconsistent with or overrule the case of *Frank* v. *Drinc-O-Matic, Inc.*, 136 Fed. (2d) 906 and they do not undertake to contradict or distort the clear import of the language of the cited sections.

The sequence of these decisions is as follows: In *Re Solar Manufacturing Corporation* follows in *Re Loewer's Gambrinus Brewing Co.*, 141 Fed. (2d) 747 which it cites. The Solar Manufacturing Corp. did not criticize the *Gambrinus Brewing Company* case but on the contrary cited it with approval.

When we turn to the case of in *Re Loewer's Gambrinus Brewing Company* we find that that case rests squarely on the authority of *Frank* v. *Drinc-O-Matic, Inc.*, 136 Fed. (2d) 906 cited by the Court of Appeals in this case in its opinion. The language of the Court in the *Gambrinus Brewing Company* case is: "Our decision in *Frank* v. *Drinc-O-Matic, Inc.*, 136 Fed. (2d) 906 is the authority for

the order of sale appealed from, etc." The confusion that seems to arise in counsel's mind may be due to the comments of the Court in *Re Solar Manufacturing Corporation*, 176 Fed. (2d) 493 on page 494. There the Court discusses sales under 116 (3) and indicates that these sales are to be confined to "emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken."

It is true that the Court in *Re Loewer's Gambrinus Brewing Company* makes reference to the excessive deterioration in the brewery equipment if not sold. And it is also true that the Court in *Re Solar Manufacturing Corporation* refers to perishable property as coming within the scope of the emergency that was being considered. However, in the footnote to the case, we find two illustrations that are intended to clear up the term "perishable". One is a case where a lease has only 60 days to run. In *Re Rosenbaum Grain Corp.*, 83 Fed. (2d) 391. The second illustration is on facts identical with the case now being considered by the Court. The exact language of the footnote is as follows:

> "A debtor's vending machines may be sold when they are in the hands of the manufacturer, who claims a lien upon them, and when the trustee has no funds with which to redeem them. *Frank* v. *Drink-O-Matic, Inc.*, 136 Fed. (2d) 906."

If we therefore trace the holding in *Frank* v. *Drink-O-Matic*, 136 Fed. (2nd) 906 through the *Gambrinus Brewing Company* case and the *Solar Manufacturing Corporation* case, we find no dissent or difference but approval. It would be quite surprising if it were otherwise as the distinguished Court in *Frank* v. *Drink-O-Matic* reads the language of Section 116(3) so as to give effect to its unambiguous words.

SUMMARY.

The foregoing may be summarized as follows:

This respondent is a pledgee of shares of corporate stock found by the Court of Appeals not used by the debtor in the prosecution of its business. The debtor filed a voluntary petition under Chapter X on May 20, 1953 and there came the resultant injunction against this respondent and the other pledgees availing itself of rights under the pledge agreement. The respondent is an innocent party to the transaction and the continuing of the injunction after the lapse of two years and many months is a deprivation of right. The debtor has not in all this long period of time suggested any method for the payment of respondent's debt as pledgee or a possible plan of reorganization involving this stock. No suggestion appears in the record in that direction. An objective survey of this record forces the conclusion that this Chapter X as it involves the stock in question is actually a device to hinder and delay this respondent and the other pledgees. That the manifest right of the pledgees to have the injunction at this late date dissolved must of necessity give to the District Court the power to protect the estate by a sale of the stock to rescue the equity for the benefit of the estate. This power is manifest under Section 115 of Chapter X or Section 116(3) of Chapter X.

In view of these circumstances, the cases and the contentions of Petitioner are not any answer and do not meet the manifest conclusion that the conduct of the debtor is a perversion of the intent of Chapter X and achieves a flagrant wrong.

In *Re Solar Manufacturing Corporation* relied upon by Petitioner does not attempt to overrule or criticize *Frank*

v. *Drink-O-Matic,* cited by the Court of Appeals in its opinion but on the contrary, its holdings rest ultimately upon *Frank* v. *Drink-O-Matic* as does the case of *Loewer's Gambrinus Brewing Company,* cited by the Court in the case of in *Re Solar Manufacturing Company.* In *Re Pure Penn Petroleum Co., Inc.,* 188 Fed. (2d) 851 is a Chapter XI case in the same circuit as the case of *Frank* v. *Drinc-O-Matic* and no reading of this case suggests any intention to overrule or criticize *Frank* v. *Drinc-O-Matic.* As a matter of fact, Judge Chase who was a member of the Court deciding *Frank* v. *Drinc-O-Matic* was also a member of the Court deciding in *Re Pure Penn Petroleum Co., Inc.*

Conclusion.

On the assumption that this Petition for Certiorari was filed in good faith and not for the purpose of delay or obstruction yet the Petition for Certiorari rests upon misapprehension of the case itself and the law applicable to it. The Petition for Certiorari should be denied.

Respectfully submitted,

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Attorney for Louis Dreyfuss, Defendant.